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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

NO. [redacted] 41

CHARLES BATCHELOR, Chief of Police
City of Dallas; T. C. SNIDER,
V. D. MONAGHAN, R. D. RODGERS, and
HENRY WADE, District Attorney, Dallas County
Appellants

v.

BRENT STEIN,
Appellee

ON DIRECT APPEAL FROM THE UNITED STATES
THREE-JUDGE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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ON DIRECT APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

Appellants' appeal from the judgment of the United States Three-Judge District Court for the Northern District of Texas, entered on June 27, 1969, declaring the Texas Obscenity Statute, Article 727b, Texas Penal Code to be unconstitutional in part and enjoining the enforcement of such statute; and Appellants submit this Jurisdictional Statement, pursuant to Rule 15 of the Rules of the Supreme Court, to show that the Supreme Court of the United States has

jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Three-Judge Court below, the United States District Court for the Northern District of Texas, entered an opinion on June 9, 1969, holding the Texas Obscenity Statute, Article 527, Texas Penal Code to be unconstitutional and determining that an injunction would lie against its enforcement by state officers and officials. This opinion is not reported, and a copy is attached hereto as Appendix A. The judgment of the Court below, entered in conformity with the earlier opinion, was rendered on June 27, 1969, and a copy of such judgment is appended as Appendix B.

JURISDICTION

This suit was brought under the provisions of 42 U.S.C., Sections 1983 and 1985, and 28 U.S.C., Sections 1343 (3)(4), 2201, 2202, 2281, 2283 and 2284, in the United States District Court for the Northern District of Texas to enjoin the enforcement of Article 527 of the Texas Penal Code, on the ground that such statute was unconstitutional. A three-judge district court was formed to hear this cause as provided for by 28 U.S.C., Section 2284. The final judgment of the Court was entered on June 27, 1969, which judgment held Article 527 was unconstitutional and granted an injunction against its enforcement by state officers. Notice of appeal was filed in that Court on July 9, 1969.

The jurisdiction of the Supreme Court to review

the decision of the three-judge court is conferred by 28 U.S.C., Sections 1253, 2101(a)(b) and 2281. The following cases sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *Florida Lime and Avocado Growers, Inc.* v. *Jacobson*, 362 U.S. 73 (1960); *Ness Produce Co.* v. *Short*. 263 F. Supp. 586 (D.C. Or. 1966), affirmed 385 U.S. 537 (1967).

STATUTE INVOLVED

As noted above, the three-judge district court below held that Article 527, Texas Penal Code, was unconstitutional and restrained its enforcement. Article 527 has since been amended, but it read, in pertinent part at the time of the Court's decision as follows:

> Art. 527. 509 Acts involving obscene articles, objects and materials; fines and penalties; exemptions
>
> Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statute, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene; shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.
>
> Sec 2. Whoever shall knowing offer for sale,

sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statute, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor shall be fined not more than Two Thousand, Five Hundred Dollars ($2,500) nor imprisoned in the county jail more than two (2) years or both.

Sec. 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided, further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Sec. 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

"

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, as held by the court below, Section 1, Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because, in Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination, when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

3. Whether Section 3 of Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standard defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no redeeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs v. Massachusetts*, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does "having a redeeming social value" mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "redeeming social value," and is the court correct in its statement that *Stanley v. Georgia*, 394 U.S. 557 (1969), overrules *Roth v. United States*, supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

8. Whether the "community standards" expression used in *Memoirs v. Massachusetts*, refers to the "national" community, the "local" community, or some other geographical or political community?

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and ignored *Cameron v. Johnson*, 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under the authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision

and permissible action of a three-judge federal court, to wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied, or (2) should the critical determination be whether the statute is being unconstitutionally *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford*, 310 U.S. 354 (1940) and referred to in *Evergreen Review v. Cahn*, 230 F.Supp. 498 (E.D. New York 1964); to wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question presented in this cause that would entitle the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

STATEMENT OF THE CASE

Brent Stein, the Plaintiff below and Appellee here, published a newspaper known as the "Dallas Notes" twice monthly in Dallas, Texas. As noted in its masthead the paper is, or was, "a member of the Underground Press Syndicate (UPS) and Liberation News Service (LNS)." An allegedly typical paper is at-

tached to Stein's Motion for Summary Judgment which is a part of the record in this Court.

On October 30, 1968, Dallas police officers obtained a search warrant authorizing the search of premises where the newspaper was published. Under the warrant, officers seized a number of newspapers, materials and printing paraphernalia, and some allegedly obscene photographs. Later, on November 15, 1968, the Dallas police executed another search warrant and seized additional items related to the publication of the paper. In neither the October 30 seizure nor the November 15 seizure was there a prior, adversary determination of obscenity.

Two misdemeanor charges were filed against Stein charging the possession of obscene materials in violation of Article 527, Texas Penal Code, and such charges were pending at the time of the filing of this suit by Stein, during the pendency of this cause and at the time of the judgment of the court below. The gravamen of the charges was *possession*, not distribution. of obscene materials.

Stein instituted this action in the United States District Court for the Northern District of Texas, which, after amendment, asked for a declaratory judgment declaring Article 527 unconstitutional and praying for a permanent injunction against the enforcement of the statute by the Dallas police and by Henry Wade, the Dallas County District Attorney.

A three-judge court was convened, and it is the judgment of that court, declaring Article 527 uncon-

stitutional and restraining its enforcement, that is being appealed.

Appellants took the position below that Article 527 is constitutional on its face and may be enforced in a constitutional manner. Moreover, however defective the methods used in this particular case by the Dallas police (if defective they be), the Texas obscenity statute should not be held to be unconstitutional and its enforcement in toto be enjoined. Appellants take the same position in this Court.

THE QUESTIONS RAISED BY THE APPEAL ARE SUBSTANTIAL

The questions heretofore set out present, Appellants feel, separate and valid issues. However, some may be more conveniently and meaningfully discussed and argued when considered together.

Questions 1 and 2

1. Whether, as held by the court below, Section 1, Article 527 of the Texas Penal Code is unconstitutional because of impermissible broadness?

2. Whether, as decided by the court below, the Texas obscenity statute, the said Article 527, is unconstitutional in its entirety, including Section 2 thereof, because, in Section 1 mere possession of obscenity is defined as a crime as well as public and commercial dissemination when this prohibition against mere possession is separable from the remaining prohibitions of the statute?

* * *

The judgment of the court below held Article 527 "to be impermissibly broad and unconstitutional." This holding was grounded in part, on *Stanley v. Georgia*, 394 U.S. 557 (1969), which held unconstitutional a statute which forbade mere private possession of obscenity.

It is true that Section 1 of Article 527 purports to make unlawful, possession of obscenity, and certainly, since *Stanley*, mere possession of obscene material cannot be punished and that portion of Article 527, which seeks to enjoin private possession, is unenforceable. However, Section 1 also makes unlawful the *distribution* of obscenity, and it was the contention of Texas below that the entire section of the article should not be declared to be unconstitutional merely because a portion thereof is unenforceable.

Nevertheless, the court below, in its opinion handed down prior to judgment, that held that:

> "Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. . . ."
>
> "Although a number of the phrases of their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconstitutional for a failure to confine its application to a context of public or commercial dissemination."

This holding below, not only renders the "distribution" portion of Section 1 inoperative, and thus precludes prosecutions for distribution of obscenity in Texas (except to minors and the "minors" section was also held to be unenforceable), but more critically, the reasoning below would unquestionably strike down many obscenity statutes in other states. This determination below thereby raises an issue of national importance, and this Court should review and finally decide the question of whether an obscenity statute enjoining both "possession" and "distribution" of obscenity can be constitutionally severable.

Questions 3, 4, 5, 6, and 7

3. Whether Section 3 of Article 527 is unconstitutional for not containing language that requires a jury or judicial finding that the material must have no redeeming social value expressed in the terms of *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)?

4. Whether, as determined by the court below, Article 527, which defines obscenity in terms of *Roth v. United States*, 354 U.S. 476 (1957), is unconstitutionally deficient in its definition of obscenity?

5. Whether, the "redeeming social value" standards defined in *Memoirs v. Massachusetts*, supra, is a defense which must be urged and proved by a defendant charged with a violation of Article 527 or is "no redeeming social value" a matter that must be pleaded and proved affirmatively by the prosecution?

6. Whether, as stated by the court below, *Memoirs*

v. Massachusetts, supra, overrules in part, modifies and extends *Roth v. United States*, supra?

7. Does having a redeeming social value mean that such material is not "obscene" or that even obscenity is constitutionally protected if it has a "redeeming social value," and is the court correct in its statement that *Stanley v. Georgia*, 394 U.S. 557 (1969), overrules *Roth v. United States*, supra, in part, because some "obscenity is afforded First Amendment protection" by the *Stanley* decision?

* * *

Questions 3 through 7 are interwoven in that they all deal with the question of whether *Roth v. United States*, supra, is still alive and viable. The Court below determined that *Roth* has expired and that the portion of Article 527 that defined obscenity in the terms of *Roth* was unconstitutionally deficient. This determination was grounded first on the premises that *Memoirs v. Massachusetts*, supra, amended and added to the constitutional definition of obscenity as prescribed by *Roth*.

Second, the Court below reasoned from *Stanley v. Georgia*, supra, that that portion of *Roth*, which held that obscenity was not constitutionally protected, was overruled by *Stanley* which decision apparently holds that some obscenity, when privately possessed, is, in fact and law, constitutionally sanctioned.

The decision by the court below, that *Roth* has been overruled or modified by *Memoirs* and *Stanley*, raises serious questions that require a plenary hearing and ultimate resolution by the Supreme Court. This is

especially true since *Roth* has been the only case where a majority of the Supreme Court concurred on an obscenity test.

In *Roth* the Court said (354 U.S. at pages 483-485):

> "The unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . All ideas having even the slightest redeeming social importance . . . have the full protection of the guarantee. . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572: 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'"

The Court continued at page 485:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

Finally at page 489, the Court held the test of obscenity is:

"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

As earlier indicated the three-judge court below found that *Memoirs* has added to the definition per se, of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus, without such inclusion the Texas statute is unconstitutional.

The portion of *Memoirs* referred by the Court above is the following expression (383 U.. at 418):

"Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The "(a)" part of the *Memoirs*, quotation in the *Roth* definition of obscenity is contained in Article 527, that is, "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex."

The "(b)" part of the *Memoirs* recital, that is, "(b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," apparently comes from *Manual Enterprises v. Day*, 370 U.S. 478 (1962) at page 486 of the Court's opinion by

Justices Harlan and Stewart. Only these two justices mentioned "patent offensiveness" and no majority of the Court agreed on any opinion.

However, the absence of the word "patently offensive" in the Texas statute was not found to be defective by the Court below.

Rather, the Court below found that the absence of any language requiring a finding that the alleged obscenity must be "utterly without redeeming social value," the "c" portion of the *Memoirs* quotation, rendered the Texas statute unconstitutional.

The "utterly without social value" expression seemingly made its appearance in *Jacobellis v. Ohio*, 378 U.S. 184 (1963) (although overtones of this view were noted in *Roth*), wherein Justice Brennan observed at page 191 of the Court's opinion:

> ". . . obscenity is excluded from constitutional protection only because it is 'utterly without redeeming social importance . . .'"

Only Justices Brennan and Goldberg concurred in the opinion, and Justice Brennan further stated at page 191:

> 'Recognizing that the test for obscenity (in *Roth*) . . . is not perfect, we think any substitute would raise equally difficult problems, and we therefore adhere to that standard."

Moreover, in a dissenting opinion in *Jacobellis*, Chief Justice Warren, joined by Justice Clark, said (378 U.S. at 200):

> "For all the sound and fury that the Roth test has generated, it has not been proven unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved . . ."

A definite test of obscenity is needed with a judicial determination being made by this Court as to whether measuring obscenity by *Roth* is still constitutionally valid or whether *Memoirs* is the new standard. Certainly, the decision in *Memoirs* does not illuminate or solve the problem. Only Justices Brennan and Fortas and Chief Justice Warren agreed on the Court's opinion reciting the necessity of three elements coalescing in obscenity cases, to wit, that:

(a) The dominant theme of the material must appeal to the prurient interest in sex (Roth),

(b) The material be patently offensive, and

(c) The material be utterly without redeeming social value.

Indeed, the opinion in *Memoirs*, 383 at 418, points out that the question, which was before the state courts in that case, was whether or not the subject book satisfied "the test of obscenity *established in Roth v. United States*. . . ." (Emphasis added)

Justice White dissented in *Memoirs*, noted at page 461 of the decision that:

> "To say that material within the *Roth* definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the *Roth* case—that such material is not protected *because* it is inherently

and utterly without social value." (Emphasis that of Justice White.)

And Justice Clark, in another dissenting opinion in *Memoirs* called the social value test "novel", (383 U.S. 443), noting that only three justices adhered to it, and observing that such test "rejects the basic holding of of *Roth*" (383 U.S. 441).

Later, in 1967, the Supreme Court, in *Redrup v. New York*, 386 U.S. 773, by per curiam opinon, noted that the three element test of *Memoirs* is one espoused by only certain justices in the *Memoirs* case. Redrup pointly did not embrace the *Memoirs* test as that of the Court.

Accordingly, it is reiterated that the Supreme Court should, in this cause, lay to rest the confusion that presently exists and set a required constitutional standard by which to measure alleged obscenity. An answer by this Court to the following questions is important to every jurisdiction in this country, federal and state:

(1) Is the *Roth* test of obscenity still the law of the land?

(2) If so, may an accused show "a redeeming social value" as a defense to a charge of distributing alleged obscene materials?

(3) Is the "test" of obscenity now to be the three-pronged "test" noted in *Memoirs*?

(4) If so, must the prosecution prove all elements of the *Memoirs* "test," or is the "redeeming social

value" element a defense to the charges which must be shown by the defendant?

(5) If the *Memoirs* test is used, in whatever form decreed, does a finding of "a redeeming social value" mean that the material is not obscene or that even obscene material is protected when it has a redeeming social value?

(6) Does "*Stanley v. Georgia*" overrule that part of *Roth* which held that obscenity is not protected by the First Amendment to the Constitution of the United States because private possession of obscenity cannot be proscribed or punished?

Question 8

8. Whether the "community standards" expression used in *Memoirs v. Massachusetts*, refers to the national community, or some other geographical or political community?

* * *

The Texas obscenity statute, Article 527, as it was written at the time of the decision in this case contained the following language:

> "Provided, further, for the purpose of this article, the term 'contemporary community standards' shall in no case involve a territory or geographic area less than the State of Texas."

This language was attacked by Stein below as being unconstitutional, Stein claiming that the decisions of this Court required that a national community be the geographical area for determining whether obscene

materials appealed to the prurient interest of the people in such community. Stein cited *Jacobellis v. Ohio*, supra, in support of his contention.

While the three-judge court below did not hold the Texas statute unconstitutional for failing to require the national community, the court wrote in its opinion that it assumed "national standards are constitutionally required."

This question, whether a local, state, national or some other geographical community is proper, should be considered and decided by this Court even though the resolution of this issue was not determinative of the decision below.

Jacobellis v. Ohio, supra, cited by the court below as its reason for believing that a national standard or community is required, certainly gives no answer to the problem. Notice should again be made that there was really no majority opinion in *Jacobellis*. Justice Brennan wrote the opinion that appears first in the decision, joined only by Justice Goldberg; Justice Goldberg wrote a separate concurring opinion in which he stated he agreed with everything Brennan had written; Justice White concurred in the judgment of reversal only; Justices Black and Douglas concurred in the reversal for the reason that they believed that any motion picture has full First Amendment protection; Justice Stewart stated that only hard-core pornography can be constitutionally limited, and that the subject matter of the case was not hard-core pornography; Chief Justice Warren, joined by Justice Clark, wrote a dissenting opinion.

In the opinion of Justice Brennan, concurred in by Justice Goldberg, it was said at 378 U.S., page 195:

> ". . . the constitutionality status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding."

Justice Warren, joined by Justice Clark, observed (378 U.S. at 200):

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none."

Therefore, *Jacobellis* would indicate that two of the Justices that decided the case felt that it was a national standard by which obscenity must be measured, while two other Justices felt that the question of obscenity must be determined by use of local community standards.

It is accordingly submitted that a resolution of what "community standard" should be finally decided by this Court. The resolution of this issue is important to every obscenity prosecution that will be commenced in the Courts of this nation.

Questions 9, 10, 11, and 12

9. Whether the court below can properly order injunctive relief, as it did, against the peace officers of

the City of Dallas and the law enforcement officials of Dallas County in this case where prosecutions were pending, and whether the court improperly interpreted *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and ignored *Cameron v. Johnson*, 390 U.S. 617 (1968), in reaching the conclusion that injunctive relief would lie in the present case?

10. Whether, as decided by the court below in its opinion of June 9, 1969, this cause of action is "a civil rights case brought under the authority of 42 U.S.C., Section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated"?

11. What exactly is the scope of review, decision and permissible action of a three-judge federal court, to wit: (1) does the court properly determine only whether a statute is constitutional on its face and can be constitutionally applied; or (2) should the critical determination be whether the statute is being unconstitutionaly *applied* to the plaintiffs; and what is the meaning of the words used first in *Ex Parte Bransford*, 310 U.S. 354 (1940) and referred to in *Evergreen Review v. Cahn*, 230 F.Supp. 498 (E.D. New York 1964); to wit:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court."

12. Was there a substantial federal question pre-

sented in this cause that would entitle the court below to rule that Article 527 is unconstitutional and/or did the action of the State of Texas in this cause merely show an "unconstitutionality of the result obtained by the use of the statute"?

* * *

The foregoing questions, questions 9 through 12, are all related to the propriety of forming a three-judge federal court and the scope of permissible action by the court after its formation.

Assuming arguendo that the three-judge court was properly constituted in this case, Appellants urge here, as they did below, that no injunctive relief should have been issued in this case. It is the state's contention that an injunction, as decreed by the court below, was improper under the principles and doctrines of equity and federalism. *Cameron v. Johnson*, 390 U.S. 617, 618 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 483-485 (1965).

The court below, however, relied on *Dombrowski v. Pfister*, supra, as authority for entering the arena of state prosecution at the early stages. This reliance apparently ignored the decision of this Court in *Cameron v. Johnson*, supra.

While the state prosecutions here charged possession of obscene matter and would hence be ineffective under the holding of *Stanley v. Georgia*, supra, Stein did not attempt to have the state courts pass on the validity of the charges prior to filing suit in federal court and, accordingly, the courts of Texas had no opportunity to apply *Stanley* to the facts of the pend-

ing charges against Stein. The determination of the applicability of *Stanley v. Georgia*, supra, as well as the validity of the Texas obscenity statute could have been tested prior to trial by habeas corpus in the Texas Court of Criminal Appeals. See *Ex Parte Sandford*, 289 S.W.2d 776 (1956).

It should also be noted that should allegedly obscene items be seized under a search warrant as was done here, Articles 18.25 and 18.26 of the Texas Code of Criminal Procedure specifically provide for a judicial inquiry into the grounds for holding the defendant and the property in question. Under these provisions the magistrate is enjoined to discharge the defendant and restore the property taken from him where he finds that there were not good grounds for the issuance of the warrant.

There was not a threat of continued state action here after the state courts had quashed arrest warrants and suppressed evidence, as was done in *Dombrowski*. Indeed, the Texas courts did not have the opportunity to pass on Stein's contentions. Appellant submits that Stein could, and should, have sought the return of the materials in question and a dismissal of the charges in the state courts of Texas, urging there, the arguments and authorities presented to the court below. See *Cameron v. Johnson*, supra, 390 U.S. at page 618.

The contentions of Stein with regard to the proper definition of obscenity, as well as all his other contentions, made in the federal court below, presuppose that state courts will ignore the case law of the Supreme Court and try the cases erroneously. It cannot be

presumed that state courts will not accord defendants their full federal and state constitutional rights in state court trials. *Walker v. Birmingham*, 388 U.S. 307, 319 (1967); *Harris v. N.A.A.C.P.*, 360 U.S. 167 (1959). The mere possibility of an erroneous application of constitutional standards will not justify federal courts' disrupting state proceedings. *Cameron v. Johnson*, supra; *Dombrowski v. Pfister*, supra. The state courts, presumably, would have construed Article 527 and applied it in keeping with constitutional principles, and the court below should have assumed that the state courts will do so. *Cameron v. Johnson*, supra; *Nesmith v. Alford*, 318 F.2d 110, 319 F.2d 859 (5th Cir., 1963), cert. denied in *Sullivan v. Nesmith*, 375 U.S. 975 (1964).

In *Brooks v. Briley*, 274 F.Supp. 538 (1967), affirmed 391 U.S. 361 (1968), a three-judge court of the Middle District of Tennessee said:

> "In our dual system of government we have rejected the concept of a national police force. Instead, we have committed to state and municipal authorities the primary responsibility for police protection and for the maintenance of law and order. Lacking such responsibility, the federal authority should be allowed to intrude itself through the Federal Courts into the law enforcement duties and activities of the states only when the necessity for such intrusion is clear and unmistakable. . ."

See also *Cameron v. Johnson*, supra; and *Zwicker v. Boll*, 270 F.Supp. 133 (Three-Judge Court, W.D. Wisconsin 1967), affirmed 391 U.S. 353 (1968).

It is submitted that injunctive relief was not proper

under the facts and circumstances as revealed below as no attempt was made to secure rulings on the questions presented in the federal proceeding in the courts of Texas.

A companion question is raised by the language of the court below at the beginning of its opinion rendered on June 9, 1969, prior to the final judgment, the court stating,

> "This case involves the constitutionality of Article 527 of the Texas Penal Code, . . . It is a civil rights case brought under authority of 42 U.S.C. section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated."

Arguendo, the facts as revealed in the Court below may have shown an illegal search and seizure and illegal prosecutions for the *possession* of obscenity, but there was no showing, Appellants submit, that the agents of the State of Texas deliberately sought to harass Stein except, perhaps, through zealous enforcement of a then valid Texas obscenity statute.

If this case can be said to fit within the provisions of 28 U.S.C. §1343(3)(4) then almost surely it can be stated that 28 U.S.C., Sections 2281 and 2284 apply. In other words, the plaintiff below could be said to have a right guaranteed by the Constitution of the United States denied because of an unconstitutional Texas statute; and to obtain injunctive relief on this ground, a three-judge district court would be required to determine the issue of unconstitutionality and grant any appropriate injunctive relief.

However, in the guise of a civil rights suit under 42 U.S.C., Sections 1983 and 1985 as determined by the court below (Section 1985 is especially inappropriate), some authority seems to support the proposition that a three-judge federal court is not necessary to order injunctive relief where a state statute is found to be unconstitutional and that one federal judge can issue injunctive relief. See *Holmes v. Danner*, 191 F.Supp. 394 (D.C. Ga. 1961); and *Sheldon v. Fannin*, 221 F. Supp. 766 (D.C. Ariz. 1963).

In the opinion below, the court said,

> "We find that the prayers for an injunction against any arrest or seizure and for the issuance of instructions is based on the alleged harassment and is not an attack upon the constitutionality of a statute. It is therefore not a subject for a three-judge court."

The above quoted language is seemingly inconsistent from the court's later determination that Article 527 is unconstitutional and that the police officers and law enforcement officials are therefore enjoined from enforcing the act "as against Plaintiff" Stein.

This gray area involving the proper applicability of 28 U.S.C., Sections 2281 and 2284, in cases where relief is grounded upon an unconstitutional state statute, should be eliminated by this Court. It is arguable that "any harassment" here was engendered only because of Article 527 and for the courts to enjoin the operation of Article 527 there must be a determination made, as was done below, that the statute is unconstitutional. Injunctive relief can only then

be proper when ordered by a three-judge district court. It follows in this context, or seems to Appellants to follow, that there is no basis for the statement of the court below that this is a civil rights case arising under 42 U.S.C., Sections 1983 and 1995, when the Court went on to determine the unconstitutionality of Article 527.

It is urged that this Court should clear up the confusion which apparently exists in the opinion of the court below on the interrelation of the civil rights provisions of Title 42 and Title 28 and the proper application of each in a case such as is presented here.

There is an additional problem inherent in the case below and in all three-judge federal court cases. Is the scope of the court's inquiry merely to be a determination as to whether the challenged statute is constitutional on its face and is capable of constitutional application by the state authorities? See the statement in the opinion below wherein the Court states at page 6 of the opinion, "Our sole concern is the determination of whether the statute is constitutionally defective on its face," and *Dombrowski v. Pfister*, supra, 380 U.S. at page 491, where the Court speaks of a statute being "attacked on its face." Or should the inquiry be expanded or limited to a determination of whether the statute is being unconstitutionally applied? See *Ex Parte Bransford*, supra.

The proper boundaries by a three-judge federal court is of critical, nationwide importance in our federal system. Should such a court only decide if a state statute is constitutional on its face or should its in-

quiry be directed to a consideration of whether the statute, as applied, is unconstitutional; and should this latter inquiry, if proper, be directed to determining whether the statute is *usually* given constitutional application by state authorities or whether the court should look only to the particular situation presented in reaching a decision on constitutional application.

Here, arguendo, Appellant will concede that the procedures used in enforcing Articles 527 were not constitutionally permissible and that, possibly, an unconstitutional result, as defined by *Ex Parte Bransford*, supra, was obtained by the use of the statute. But again, should these circumstances authorize the empaneling of a three-judge federal court? Appellants submit that the permissible scope of action by a three-judge federal court is not now clearly defined and that this question should be answered by the Supreme Court in order to provide guidelines in future three-judge court controversies involving constitutionality of state statutes.

CONCLUSION

The three-judge federal court below incorrectly held the Texas obscenity statute, Article 527, to be unconstitutional for the reasons given above. Furthermore, whether Article 527 be constitutional or unconstitutional, the court below erroneously, under the principles of federalism, enjoined state officials from enforcing the statute.

Jurisdiction is clear, and the questions presented are so substantial and of national importance as to require plenary consideration by this Court.

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Jurisdictional Statement has been served on counsel for the Appellee by depositing same in the United States Mail, postage prepaid, addressed to Mr. David R. Richards, 205 Texas AFL-CIO Building, 308 West 11th Street, Austin, Texas 78701, this the ..... day of ....., 1969.

LONNY F. ZWIENER
Assistant Attorney General

APPENDIX A

IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRENT STEIN Plaintiff, v. CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County Defendants.	)	Civil Action 3-2951-B

Before GOLDBERG, Circuit Judge, HUGHES and WOODWARD, District Judges.

HUGHES:

This case involves the constiutionality of Article 527 of the Texas Penal Code, entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions." It is a civil rights case

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Section 1. Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both.

Section 2. Whoever shall knowingly offer for sale, sell, give away, exhibit, televise, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story,

brought under authority of of 42 U.S.C. section 1983 and 1985 by Brent Stein, individually and on behalf of the class similarly situated.

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pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, to a minor, shall be fined not more than Two Thousand Five Hundred Dollars ($2,500.00) nor imprisoned in the county jail more than two (2) years or both.

Section 3. For purposes of this article the word "obscene" is defined as whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. Provided further, for the purpose of this article, the term "contemporary community standards" shall in no case involve a territory or geographic area less than the State of Texas.

Section 4. Whoever shall be convicted for the second time of a violation of this article shall be deemed guilty of a felony and shall be punished by confinement in the State penitentiary for not more than five (5) years or by a fine of not more than Ten Thousand Dollars ($10,000.00) or by both such fine and imprisonment.

Sec. 5. It shall be a defense to any charges brought hereunder if such prohibited matter or act shall be regularly in use in any bona fide, religious, educational or scientific institution or the subject of a bona fide scientific investigation.

The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) legally move in the interstate commerce under Federal Law; or (3) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry.

The provisions of this Act shall not apply to any daily or weekly newspaper.

Sec. 6. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district or county attorney within their respective jurisdictions, to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act.

Plaintiff Stein is the publisher of an underground, bi-weekly newspaper, known as the "Dallas Notes". The class which he represents is composed of present and future employees of and contributors to the "Dallas Notes", and persons engaged in the distribution of the "Dallas Notes". The defendants, all of whom are sued in their official capacities, are Henry Wade, District Attorney of Dallas County, Charles Batchelor, Chief of Police, City of Dallas, and three members of the Dallas Police Department.

Plaintiff alleges that the Defendant police have engaged in a deliberate course of treatment designed to harass Plaintiff, for the purposes of suppressing the dissemination of the "Dallas Notes" and the political views expressed therein. They allege further that as a result of two searches of Stein's residence by the police (a portion of the first floor of his residence is used as a work area) there are presently pending against him two misdemeanor cases in the County Criminal Courts of Dallas County, charging him with possession of obscene "paper" and "pictures" in violation of Article 527 of the Texas Penal Code. Plaintiff alleges that he wishes to continue publication of the "Dallas Notes" and fears future arrests and prosecutions under Article 527 unless the rights of the parties thereunder are declared by this Court.

Plaintiff prays (1) for an injunction against Defendants enjoining them from arresting, presenting for indictment, or prosecuting Plaintiff (with the exception of presently pending causes) under Article 527 of the Penal Code of the State of Texas and (2) for a declaratory judgment declaring Article 527 to

be unconstitutional on its face and as applied to Plaintiff. Plaintiff also prays (3) for an injunction against Dallas Police enjoining any arrest of Plaintiff of seizure of his property on the grounds of obscenity without a prior determination of the obscene character of the material in question and requiring the issuance of various instructions to the Police Department.

We find that the prayers for an injunction against any arrest or seizure and for the issuance of instructions is based on the alleged harassment and is not an attack upon the constitutionality of a statute. It is therefore not a subject for a three-judge court.

Therefore, after disposing of the motion for summary judgment this Court will decline to exercise any pendant jurisdiction, which it may have over the remaining claims, and will remand the remainder of the case for determination by a single District Judge.

Plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, has filed a motion for partial Summary Judgment praying that Article 527 be declared unconstitutional.

All Defendants have filed Motions to Dismiss, relying primarily upon (1) the federal anti-injunction statute 28 U.S.C. section 2283 (2) the abstention doctrine and (3) the failure to raise a substantial constitutional question.

Plaintiff contends Article 527 is unconstitutional for the following reasons: (1) that it makes mere possession of obscene material a crime; (2) that it is an

overbroad regulation of expression since the definition of obscenity does not require that the material be utterly without redeeming social value; and (3) that is offends the equal protection clause of the fourteenth amendment because Section 5 exempts daily and weekly but not bi-weekly newspapers from the operation of the statute.

An Amicus Curiae filed a brief with the permission of the Court and in addition to the contentions of plaintiff, Amicus Curiae contends that the statute improperly limits the geographical area within which contemporary community standards are to be measured and applied and fails to provide certain procedural safeguards.

Considering first Defendants' contentions in their motion to dismiss we find them without merit. The claim that 28 U.S.C. 2283[2] bars injunctive relief is answered in *Dombrowski v. Phister*, 380 U.S. 479 (1965). The Supreme Court in that case held the statute did not apply to prosecutions that arise after the filing of the complaint in the district court. The Court declared:

> "This statute (2283) and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted . . . Since the grand jury was not convened and indictments were not obtained until after the filing of the complaint, which

[2] 28 U.S.C. 2283 provides as follows: "A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

sought interlocutory as well as permanent relief, no state "Proceedings" were pending within the intendment of 2283". *Id.* at 484 n. 2.

See also Cameron v. Johnson, S.D. Miss. 1966, 262 F.Supp. 873 and *Landry v. Daily*, N.D. Ill. 1968, 288 F.Supp. 200, 221-224. In the case before us Plaintiff is seeking to enjoin only future prosecutions and the anti-injunction statute does not apply.

The second contention of Defendants that this Court should abstain until the State Courts have had an opportunity to pass on the constitutionality of the statute was likewise considered in *Dombrowski v. Phister*, *supra*. There Louisiana's subversive Activities and Communist Control Law was attacked as being unconstitutional. A three-judge court dismissed holding the abstention doctrine applied. The Supreme Court reversed, declaring:

> "We hold the abstention doctrine is inappropriate for cases such as the present one where - - - statutes are justifiably attacked on their face as bridging free expression." p. 489.

We believe that the case before us is similar to *Dombrowski* in its attack on the Texas obscenity statute and that we should not abstain.

As to whether a substantial constitutional question is raised it was held in *Ex parte Boresky*, 290 U.S. 30 (1933) "[t]he existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint."

With reference to the allegation in the case before

us we cite the case of *Phelper v. Decker*, 5th Cir. 1968, 401 F.2d 232. Petitioner in that case had been convicted of possessing obscene material in violation of Article 527 of the Texas Penal Code. The Circuit Court, while refusing to consider the constitutionality of the Statute because of the failure of petitioner to exhaust state remedies, declared with reference to its constitutionality at page 240

> "Since the Texas Statute is utterly devoid of any language that requires a finding that the material must have no redeeming social value, it may be constitutionally suspect."

In the case before us the constitutionality of the statute is attacked on various grounds which we believe satisfy the requirements of substantiality.

Before discussing the merits of this controversy, we wish to re-emphasize that consideration of the Motion for summary judgment does not in any way involve an appraisal of the constitutionality of the application of Article 527 to Plaintiff. Our sole concern is the determination of whether the statute is constitutionally defective on its face.

Section 1 of Article 527 provides:

> "Whoever shall knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, . . . or other article which is obscene . . ."

In view of *Stanley v. Georgia*, U.S. , 37 L.W.

4315 (April 7,1969) the above section is clearly unconstitutional in so far as it makes mere possession of obscene material a crime. A difficult question remains, however, concerning the extent to which Section 1 is affected by *Stanley*. The State points out that the session law of which Article 527 is the codification (Chapter 461, Acts 57 Leg. R.S. 1961, Ch. 461, p. 1041), contains a severability clause and argues that only the portion reading "have in his possession or under his control" is affected by the *Stanley* decision. We do not agree.

Although the narrow holding of *Stanley is* simply that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime", we think that the case also stands for a broader proposition. Since *Stanley* involved a direct review of a state conviction for possession of obscene matter, the narrow holding was sufficient to reverse the conviction; thus it was not necessary for the Court to base its decision on a broader ground. It is impossible, however, for this Court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in *Roth v. United States*, 354 U.S. 476, 485 (1957) that "obscenity is not within the area of constitutionally protected speech or press."

In *Roth* the Supreme Court declared that obscenity is not protected by the First Amendment, whereas non-obscene expression is fully protected, unless excludable because encroachment upon the limited area of more important interests. The exclusion of obscenity from First Amendment protection was justi-

fied on the theory that obscenity is devoid of ideas having even the slightest redeeming social value. The following passages from the *Stanley* opinion appear to modify the dichotomy between protected and unprotected expression by recognizing that at least in some contexts obscenity is afforded First Amendment protection and thus cannot constitutionally be regulated in the absence of a legitimate countervailing societal interest:

> "*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections."

> "It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case - - a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home - - that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusion into one's privacy."

Stanley expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of "public actions

taken or intended to be taken with respect to obscene matter".

Of course, the First Amendment does not confer absolute immunity from regulation. The State may regulate even non-obscene expression if there is a legitimate state interest. However, *Stanley* also indicates that in the context of "private" expression there is unlikely to be any legitimate state interest justifying regulation (with the possible exception of the State's interest in protecting children).

Applying the above discussion of the scope of the *Stanley* decision to the present case, we conclude that Section 1 as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination. In addition to proscribing the mere possession of obscene material, Section 1 states that "whosoever shall knowingly photograph, act in, pose for . . . print" etc. without any limitation that such activities be engaged in publicly or with the intent to publicly or commercially distribute the materials involved. Although a number of the phrases in their normal and natural usage connote a public activity, this Court is disinclined to separately analyze each phrase appearing in Section 1 to determine if it is constitutionally viable. In our opinion the various provisions of Section 1 are too numerous and interrelated for such an approach to be meaningful. We therefore hold that the whole of Section 1 is unconsti-

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Indeed, *Stanley* may reasonably be read as supporting the proposition that obscenity is fully protected by the First Amendment, but that the State has a legitimate interest in regulating the public dissemination of ideas inimical to the public morality.

tutional for failure to confine its application to a context of public or commercial dissemination.

Next we consider Plaintiff's contention that the absence of any language in the definition of "obscene" requiring that the material be "utterly without redeeming social value" renders Article 527 an impermissibly vague and overbroad regulation of expression.

Article 527 defines "obscene" as "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests."

This is the definition of obscenity contained in *Roth v. United States*, 354 U.S. 476 (1957). While the Court in *Roth* did not include in its definition, per se, that material to be obscene must be "utterly without redeeming social value" it quoted the following from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942):

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality - - - "

In *Jacobellis v. Ohio*, 378 U.S. 184 (1963) the Su-

preme Court declared at 191 that while the test in *Roth*

> "is not perfect, we think any substitute would raise equally difficult problems and we therefore adhere to that standard".

The Court, however, went on to say:

> "We would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because is is 'utterly without redeeming social importance' - - -" *Id.*

While in both *Roth* and *Jacobellis* there is a recognition by the Court that material to be obscene, must be "utterly without redeeming social value" these words are not included in the definition.

In *Memoirs v. Massachusetts*, 383 U.S. 413 (1965), however, the Supreme Court went further when it declared at 418 that in order for material to be obscene:

> "Under this (*Roth*) definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in tex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The Fifth Circuit has not passed directly on the question before us but in the case of *Phelper v. Decker*

the Court made this comment at p. 40 on the statute before us:

> "Since the Texas Statute is devoid of any language that requires a finding that the material must have no redeeming social value it may be constitutionally suspect."

The definition of "obscene" in Article 527 does not appear to have been construed by the Texas Courts. In this circumstance we must place our own construction on the statute.

It is clear to us that the Supreme Court in *Memoirs* has added to the definition per se, of "obscene" in the *Roth* case by including in it the provision that to be "obscene" material must be "utterly without redeeming social value." Thus without such inclusion the Texas statute is unconstitutional.

As to the Plaintiff's contention concerning contemporary community standard, we assume *arguendo* that national standards are constitutionally required. See *Jacobellis v. Ohio*, *supra* at 192-195. This portion of Article 527 apparently has not been construed by the Texas courts. In our opinion Article 527 may reasonably be construed as merely rejecting "local" (i.e. less than state-wide) community standards, and thus is not constitutionally deficient.

Amicus Curiae contends that Article 527 is unconstitutional because it lacks any provision for an adversary hearing on the question of obscenity prior to seizure, citing *inter alia Marcus v. Search Warrant*, 367 U.S. 717 (1961), *Quanity of Books v. Kansas*,

378 U.S. 205 (1964), and *Freedman v. Maryland* 380 U.S. 51 (1965).

We conclude, however, that the absence of such a provision does not invalidate the statute. None of the cases cited support this proposition. In most of the cases cited the Supreme Court reversed a conviction because the *procedures* involved were inadequate. And in *Freedman v. Maryland* the statute declared unconstitutional was not a penal statute such as Article 527, but a civil statute which required that all films be submitted to a Board of Censors before being shown to the public.

As the State points out there is at least one procedure whereby Article 527 as written may be constitutionally enforced; police officers can purchase material, and prosecutions can be instituted on the basis of the purchased articles.

If, in fact, constitutionally suspect procedures are followed in enforcing Article 527, then the constitutionality of such procedures can be collaterally attacked in federal court without the necessity of exhausting state remedies. The *Dombrowski* rationale, if not the precise holding itself, would apply to this situation since First Amendment rights may be irretrievably lost by a seizure of Constitutionally protected publications. *See e.g. Poulos v. Rucker, M.D.* Ala. 1968, 288 F. Supp. 305.

We will not pass upon Plaintiff's contention that the exemption of daily and weekly but not bi-weekly newspapers from the operation of Article 527 offends the equal protection clause of the Fourteenth Amend-

ment. Since this ground of attack does not involve an allegation that the statute on its face is repugnant to the First Amendment, *Dombrowski* does not compel us to dispense with abstention and the limitation upon the exercise of federal equity jurisdiction.

In conclusion, Section 1 of Article 527 is impermissibly and unconstitutionally broad. The definition of "obscene" in Section 3 should include a requirement that the material be "utterly without redeeming social value". Plaintiff is entitled to a declaratory judgment to this effect and to injunctive relief against the enforcement of Sections 1 and 2.

Judgment will be entered in accordance with the declarations and conclusions reached herein.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

BRENT STEIN Plaintiff	)	
V	)	Civil Action 3-2951-B
CHARLES BATCHELOR, Chief of Police, City of Dallas; T. C. SNIDER, V. D. MONAGHAN, R. D. RODGERS, and HENRY WADE, District Attorney, Dallas County Defendants	)	

FINAL JUDGMENT AS TO PART OF PLAINTIFF'S CLAIM

This action came on for hearing on Plaintiff's Motion for Partial Summary Judgment before a three-judge court composed of the Hon. Sarah T. Hughes, the Hon. Irving Goldberg, and the Hon. H. O. Woodward and the issues having been duly heard and a decision having been duly rendered in an opinion filed with the Clerk on June 9, 1969.

IT IS ORDERED, ADJUDGED AND DECREED:

1. Section 1 of Article 527 of the Texas Penal Code, Acts of 1961 57th Legislature entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemption." is hereby de-

clared to be impermissibly broad and unconstitutional.

2. The definition of obscene as set forth in Section 3 of the aforesaid statute is unconstitutional because of failure of that definition to include a requirement that the material be utterly without redeeming social value.

3. Defendants are permanently enjoined from future enforcement of Sections 1 and 2 of Article 527 of the Texas Penal Code, Acts of 1961, 57th Legislature entitled "Acts involving obscene articles, objects, and materials; fines and penalties; exemptions." as against Plaintiff.

4. All claims and issues not herein determined are reserved for determination by a single judge of this court.

ENTERED this 27 day of June, 1969.

IRVING L. GOLDBERG
JUDGE, UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

SARAH T. HUGHES
JUDGE, UNITED STATES DISTRICT COURT

HALBERT O. WOODWARD
JUDGE, UNITED STATES DISTRICT COURT